

**Luis Kutner and the development
of the advance directive (living will)**

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of the advance directive (living will)**

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1. Introduction

Today, the advance directive is a well established instrument for end-of-life-decisions in the western world.¹ It is well known that Luis Kutner (1908–1993) played an important role in the development of the living will (as he had called his concept of an advance directive). To quote a current “reference handbook” on the history of “euthanasia”: “Luis Kutner, an attorney who practiced law in Chicago, Illinois, is credited with proposing that living will documents be used as a means of allowing people to express their wishes regarding end-of-life-care.”²

But with regard to the question as to when exactly Kutner developed his concept of the living will, the answers in the specialist literature vary considerably.³ This is not the least due to the fact that Kutner himself made

¹The term advance directive today is connected with “passive euthanasia” and not with “active euthanasia”. But this is a matter of definition. In 1936 the British Voluntary Euthanasia Legalization Society introduced a bill into the House of Lords which aimed at allowing a patient who suffered from a fatal illness to sign a declaration requesting the administration of active euthanasia; see Margaret Otłowski: *Voluntary Euthanasia and the Common Law*. Oxford 1997, p. 334. Such a declaration might have been called an advance directive (although it was not).

²Jennifer Fecio McDougall, Martha Gorman: *Euthanasia. A Reference Handbook*. Second Edition. Santa Barbara (California) 2008, p. 137f. McDougall/Gorman 2008, p. 102f. wrote: “1967 – The Euthanasia Education [! recte: Educational] Fund, a tax-exempt partner of the Euthanasia Society of New York, is formed to educate the public about death and dying. In cooperation with Luis Kutner, an attorney from Chicago, the organization creates the first living will”.

³Just to give a few examples from German studies: According to Reiner Füllmich: *Der Tod im Krankenhaus und das Selbstbestimmungsrecht des Patienten*. Frankfurt am Main etc. 1990, p. 66 Kutner had used the *term* living

different statements on the date of his “invention” (he always stressed that it was his “invention”).

In his first publication on the living will in 1969 there is no account of a “history” of his living will idea.⁴

In the Chicago Daily Law Bulletin from April 9, 1976 Kutner published a short article on the concept of the living will, a concept which he “originated in 1949.”⁵

In 1987 Kutner wrote: “The author first proposed the concept, formulation, and application of the Living Will in 1930, about the same time he proposed the Writ of World Habeas Corpus.”⁶

will since 1967, but had developed the *concept* “in the 1930s”. Bettina Eisenbart: *Patienten-Testament und Stellvertretung in Gesundheitsangelegenheiten*. Baden-Baden 1998, p. 31 followed Füllmich (without quoting him in the footnote concerning Kutner). Udo Benzenhöfer: *Der gute Tod? Euthanasie und Sterbehilfe in Geschichte und Gegenwart*. München: C. H. Beck 1999, p. 153 wrote with reference to Eisenbart that Kutner had developed the living will together with the Euthanasia Society of America arguably (“wohl”) in 1967. See now Udo Benzenhöfer: *Der gute Tod? Geschichte der Euthanasie und Sterbehilfe*. Second Edition. Vandenhoeck & Ruprecht, Göttingen 2009, p. 142. In the second edition the author was able to refer to Udo Benzenhöfer, Gisela Hack-Molitor: *Die Rolle von Luis Kutner bei der Entwicklung der Patientenverfügung*. In: *Hessisches Ärzteblatt* 70, 2009, p. 411–413; in this small journal we published the first results of our research on Kutner in June 2009.

⁴Luis Kutner: *Due Process of Euthanasia: The Living Will, A Proposal*. In: *Indiana Law Journal* 44 (1969), p. 539–554. This article was written in 1967 (see below).

⁵Luis Kutner, “Re: Death With Dignity”. *Chicago Daily Law Bulletin* April 9, 1976 (LKP, Box 5).

⁶Luis Kutner: *The Living Will: The Epitome of Human Dignity in Coping With the Historical Event of Death*. In: *University of Detroit Law Review* 64 (1987), p. 661.

Did Kutner develop his concept of the living will around 1930, around 1949 or around 1967?⁷

We have tried to clarify the question by screening the Luis Kutner Papers, deposited at the Hoover Institution Archives at Stanford University, California.⁸ To our knowledge, we were the first to examine these materials with regard to the history of the advance directive. The Luis Kutner Papers (abbreviated in our text as **LKP**) consist of “writings, correspondence, legal briefs, and printed matter relating to international civil rights cases,

⁷The answer to this question is important. It is still unclear who “invented” the living will. L. Kuepper wrote in 1981 that “in 1949, Abraham L. Wolbarst, a founding member of the ESA, announced that he had drafted a letter instructing his physician not to initiate extraordinary medical treatment should he become hopelessly ill. A prominent member of the Advisory Board followed the same course” (Stephen L. Kuepper: *Euthanasia in America, 1890–1960: The Controversy, the Movement, and the Law*. PhD Diss. Rutgers University 1981, p. 307). Kuepper referred to *ESA Bulletins* (April–May, 1949, 3; June–July, 1949, 2) as sources for his statement. – It is certain that in 1949 there was a debate among ESA members with regard to advance directives. In her doctoral dissertation, *The Last Civil Right? Euthanasia Policy and Politics in the United States* (University of California, San Francisco 1998, p. 128) Valery Garrett wrote that “in 1949” Euthanasia Society member Elsa W. Simon prompted “wide discussion” in the ESA by stating “that she had left instructions for her physician to discontinue any treatment to prolong life if she should ever suffer from an incurable disease and be mentally unable to make the decision at that time” (no source is given for this statement). According to Garrett (she referred to a letter from Julius Kaunitz to Miss Edwards from May 26, 1949 in the *Concern for Dying Papers*), several board members dismissed Simon’s idea as dangerous or impractical. Nota bene: Garrett mentioned (with reference to the *Euthanasia Society Bulletin* June–July 1949) that ESA board member Abraham L. Wolbarst “claimed” to have done “the same thing [as Simon] years [!] previously and connected the instructions to his will” (p. 128). We do not know whether Wolbarst’s claim is true (it appears he did not give any proof for his statement). However if a) Wolbarst’s statement is correct, and if b) Kutner had not made his “invention” around 1930, then Kutner was not the “originator” of the living will.

⁸We have not checked other archives for Kutner materials.

world federation, and attempts to secure international recognition of habeas corpus and due process of law”.⁹ Private papers or correspondence with family or friends are not included. The Luis Kutner Papers were acquired by the Hoover Institution in 1982, additional materials were added from 1983 to 1993, the year of Kutner’s death.¹⁰ The Papers are kept in 240 archive boxes.

⁹See Aparna Mukherjee: Luis Kutner – An Inventory of his Papers in the Hoover Institution Archives. Stanford University 2006.

¹⁰Mukherjee 2006 (Scope and Content Note, without page number).

2. Luis Kutner – a biographical note

Who was Luis Kutner? He was born on June 9, 1908 in Chicago, Illinois.¹¹ His parents were Russian-Jewish immigrants.¹² He entered the University of Chicago at the age of 15, and finished law school at the age of 21.¹³ In 1930 he was admitted to the bar for the State of Illinois.¹⁴

Kutner was an excellent lawyer. He specialized in the field of human rights and gained national recognition in the USA in 1949 when he obtained freedom for a black mechanic from Waukegan, Illinois, who had served nearly 26 years of a life term for a crime he had not committed.¹⁵ He campaigned for a worldwide Habeas Corpus code, so that any arrested person would be properly charged and, at the court's discretion, released on

¹¹Mukherjee 2006 (Biographical Note, without page number).

¹²See Wolfgang Saxon: Luis Kutner, lawyer who fought for human rights, is dead at 84. In: The New York Times March 4, 1993 (available at <http://www.nytimes.com>). According to the United States Federal Census (available via internet) of the years 1910, 1920 and 1930, there was a Jewish family named Kutner who had immigrated from Russia to Chicago in 1905 (most likely this was Kutner's family). This family had four children, the third was a son named Louis [!] who was born in 1908. The head of the family was Paul Kutner (*1881 or 1882, Russia), a painter, who was married to Ella Kutner (*1884 or 1885, Russia). In the 1940s, a Paul Kutner together with an Ella Kutner lived in Miami-Dade, Florida (Florida State Census, 1867–1945). Paul Kutner died there in 1945. Ella Kutner died 22 years later in December 1967 (Florida Death Index, 1877–1998).

¹³See Saxon 1993 (without page number).

¹⁴See Mukherjee 2006 (Biographical Note, without page number).

¹⁵See Saxon 1993 (without page number).

bail.¹⁶ Together with Peter Benenson, he founded Amnesty International in London (1961).¹⁷

Kutner was not only a well-known lawyer and author of books on different aspects of the law, but also a talented poet and musician.¹⁸ A certain conceitedness was surely one of his character traits, as is to be concluded from the presentation of his “titles” in a publication from 1987: “LL. B.; J. D.; Member, Illinois Bar; Chairman, Commission for International Due Process of Law; Chairman, World Habeas Corpus Committee of the World Peace Through Law Center; former visiting professor of Law, Yale Law School (1945–54); former Consul of Ecuador (1948–52); former Consul General for Guatemala (1960–63); former Special Assistant Attorney General of the State of Illinois (1978–82); Special United States Master in Chancery and Special United States Commissioner (1965–present); 1962, 1972, 1974, 1975, 1976, 1987, and 1988 congressional nominee for the Nobel Peace Prize; recipient of numerous awards in civil rights and liberties; National Director, United Veterans Association; author of the *Living Will* (1967) [sic!], *Outer Space Torts* (1980), *World Genocide Tribunal* (1985), *The Arctic Ocean: A Contest of Sovereignty*; and *World Habeas Corpus and Humanitarian Intervention* (1984).”¹⁹

Kutner died in Chicago on March 1, 1993 at the age of 84.²⁰

¹⁶See Saxon 1993 (without page number).

¹⁷See Mukherjee 2006 (Biographical Note, without page number).

¹⁸See Saxon 1993 (without page number).

¹⁹Luis Kutner: *The Living Will: The Epitome of Human Dignity in Coping With the Historical Event of Death*. In: *University of Detroit Law Review* 64 (1987), p. 661–686, here p. 661.

²⁰See Saxon 1993 (without page number).

3. Excursus: The euthanasia debate in the USA (1890–1970)

Luis Kutner's references to the history of the euthanasia movement in the United States, as documented in the LKP, were not without some flaws. Therefore, a short survey on this history may be appropriate.

The following relies in its first part (1890–1945) on the doctoral thesis of Stephen L. Kuepper from the year 1981.²¹

According to Kuepper, suicide and voluntary euthanasia were “highly significant topics” in the United States during the years between 1890 and 1920 (p. 59). For example, in 1899 the influential lawyer Simeon E. Baldwin issued a plea for passive euthanasia (p. 34). Baldwin demanded the right to reject aids like chemical stimulants and “artificial resuscitation” for the hopelessly ill patient (p. 35).

According to Kuepper, between 1890 and 1920 Americans also confronted the question of involuntary euthanasia of physical and mental “defectives” (p. 59). In November 1915 the case of Anna Bollinger's baby was highly publicized. Dr. Harry J. Haiselden from Chicago's German-American Hospital decided to “stand by passively” and let the “badly deformed” baby die (p. 68f.). Quite surprisingly, neither the Bollingers nor Haiselden were harassed in any manner by law enforcement agencies (p. 80).

According to Kuepper, the controversy over voluntary euthanasia in America subsided during the 1920s and the beginning of the 1930s (p. 95).

²¹See Kuepper 1981. Kuepper carried out a sizeable portion of his research at the offices of Concern for Dying in New York City, a successor organisation of the ESA. For the history of euthanasia before 1945 see also Garrett 1998, Ian Dowbiggin: *A Merciful End. The Euthanasia Movement in Modern America*. New York 2003 and Shai J. Lavi: *The Modern Art of Dying. A History of Euthanasia in the United States*. Princeton, Oxford 2005.

But there were still some pro-euthanasia voices, for example William A. Guild, a Chicago physician, who publicly called for passive euthanasia for defectives and the incurably ill in 1931 (p. 97).

In the middle of the 1930s the controversy became more heated. The initial action, which was to provoke the debate in the United States, took place in England (p. 104). In 1931, C. Killick Millard, a medical officer of health for Leicester, proposed the legalization of voluntary mercy deaths in an address to medical officers in London (p. 104). In 1935, Millard helped found the Voluntary Euthanasia Legalization Society in London (p. 104). In 1936 the Society presented a voluntary euthanasia bill to the House of Lords, which was defeated (p. 104f.).

Nonetheless, Americans soon followed suit, with a bill in the Nebraska legislature, and the formation of a national society. The Nebraska proposal was prepared by Inez C. Philbrick, a physician from Lincoln, Nebraska. She enlisted the aid of State Senator John H. Comstock, who introduced the bill into Nebraska's legislature in early February 1937 (p. 106). The bill called for voluntary euthanasia for "terminal sufferers" (p. 106), it was rejected.

The chain of events leading to the creation of a euthanasia society in America began in 1936 (p. 107). According to Kuepper, in February 1936 Charles Francis Potter, noted clergyman and author, delivered a pro-euthanasia lecture to the First Humanist Society of New York (p. 107). Potter's ideas attracted the attention of Ann Mitchell, a wealthy New Yorker (p. 107f.). Mitchell contacted Potter, and offered to finance an organization dedicated to legalizing euthanasia (p. 108). Potter agreed, and by the end of 1937, he had gained support from prominent persons. On January 16, 1938, he announced the formation of the National Society for the Legalization of Euthanasia, soon to be renamed the Euthanasia Society

of America (ESA) (p. 108). Potter became the Society's first president (p. 109).²² The Society tried to introduce a bill for the legalization of euthanasia into the New York legislature (p. 122). The members of the board of advisors chose to restrict the bill to voluntary mercy deaths,²³ but nonetheless no legislator would introduce it (p. 123).

News of Nazi "euthanasia", which was nothing but murder, began filtering into the United States in 1941 (p. 151). During the next two years articles appeared in newspapers and magazines throughout the country (p. 151). As a result, ESA suspended its then still pending legislative activity in 1943 (p. 152).

The following description of the post-war history of euthanasia in the United States is based on Ian Dowbiggin's "A Merciful End" (2003) as the main source.²⁴

From 1946 until 1950 the gynaecologist Robert L. Dickinson was president of the ESA (p. 74f.). Dickinson's main contribution to the euthanasia

²²Nota bene: Kutner is not mentioned in this context by Kuepper, Garrett, Dowbiggin and Lavi. Whether Kutner had contact with Potter or Mitchell in the 1930s has to be left open (although it seems unlikely to us).

²³According to Dowbiggin, most members of the ESA agreed that a euthanasia law should cover incurably ill people who voluntarily requested their doctor to put them out of their misery (p. 56). But behind closed doors there was a strong sentiment in favour of extending euthanasia to cover unconscious geriatric patients, the incurably insane and handicapped infants and children (p. 56). In 1943, even after credible reports of the Nazi "euthanasia" program had reached the United States, the society formed a committee to draft an involuntary euthanasia bill (p. 72).

²⁴Dowbiggin's study is more elaborated than Kuepper's, and it includes the 1960s. Dowbiggin, as Kuepper, had screened materials from the ESA-archive. In 2003, these materials were kept among the Partnership for Caring, Inc., Records in Baltimore (Lewis Associates). For the history of euthanasia in the United States after 1945 see also Garrett 1998 and Lavi 2005.

movement according to Dowbiggin was his chairmanship of the ESA-affiliated “Committee of 1776 Physicians for Legalization of Voluntary Euthanasia in New York State” in the late 1940s (p. 76). The committee produced a petition signed by 1,776 New York physicians. By late 1947 every member of the state legislature had received a copy (p. 76).

But the petition met with massive opposition, for example by the American Medical Association, who issued a statement in 1950, that the “majority of doctors do not believe in [euthanasia]” (p. 76). Also prominent members of the Roman Catholic Church did everything they could to contest the legalization of euthanasia in the United States (p. 82).

In 1949 the ESA tried to introduce a euthanasia bill in the New York state assembly (p. 92). It failed, not the least because of opposition from the Catholic side (p. 92).²⁵

In 1952 the ESA petitioned the Human Rights Commission of the United Nations to declare the right to die a basic human right for people dying of an incurable disease (p. 94). The petition bore the signatures of over 2,500 prominent individuals from the United States and Great Britain (p. 95).²⁶ It was not adopted.²⁷

According to Dowbiggin, changing public opinion and not legalizing euthanasia became the policy of choice for the ESA under the presidency of lawyer Pauline Taylor (1962–1964) and Unitarian minister Donald

²⁵Another activity of the ESA has to be mentioned: It had formed a ministers’ committee during the Second World War. By 1944, forty-six Protestant and Jewish clergymen had signed an “ethical statement” pro euthanasia (Kuepper 1981, p. 141f.). The statement was incorporated into a petition, which was drafted in 1948 by three prominent theologians. It was signed by 379 clergymen and reached the lawmakers in January, 1949 (Kuepper 1981, p. 290f.).

²⁶Dowbiggin is referring here to an interview with Charles Henry Potter published in 1958. He obviously had not seen the list.

²⁷See Kuepper 1981, p. 290.

McKinney (1965–1969) (p. 107f.). McKinney received much help from ESA secretary Katharine (Kay) Mali. Mali had joined the board of the ESA in 1955 (p. 109), and became its secretary (Dowbiggin does not mention when). In 1969 she became president of the Euthanasia Educational Fund, a tax-exempt charity organization, which sought to “educate” Americans in matters of death and dying (p. 107).²⁸

²⁸In 1974, ESA became the Society for the Right to Die, and in 1977 the Euthanasia Educational Fund (having changed its name to Euthanasia Educational Council in 1972) became Concern for Dying (Dowbiggin 2003, p. 118).

4. Kutner's interest in euthanasia and the living will in 1967

It is well documented in the LKP that in the second half of 1967, Luis Kutner addressed the issue of euthanasia intensively. The first mention of his preoccupation with this issue in the LKP is August 15, 1967. That date appears in a letter of September 7, 1967, written by Nancy Mamis, executive secretary of the Euthanasia Society of America, New York. Mamis answered a letter of enquiry by Kutner which unfortunately is not extant. Its reconstruction is easy, given Mamis' words: "Dear Mr. Kutner, Thank you very much for your letter of August 15, 1967 in which you request information about euthanasia and the Society. I am enclosing all that we have. [...] Would you please send us a copy of your article or let us know how we can obtain it when it is complete?"²⁹ Obviously, Mamis referred to an article on euthanasia which Kutner had mentioned without clear reference to its state of completion.

Kutner thanked Mamis for "the material you directed to me on euthanasia" in a letter which was also dated September 7, 1967 (maybe this was just misprinted, maybe Mamis had sent the material prior to her letter).³⁰ This letter shows that Kutner had the idea of organising an international congress on euthanasia at that time: "The Senior Editor of one of my publishers and I are working together on a world symposium on the subject".³¹ Kutner's subsequent request for "any additional leads on persons around the world who might contribute to this symposium" was

²⁹Luis Kutner Papers, Box 8, folder „Merciful release or Euthanasia-Symposium“.

³⁰Ibid. The following quoted letters of September 1967 are all contained in Box 8, folder „Merciful release or Euthanasia-Symposium“.

³¹Most likely Ann Pinchot (see below, letter from August 16, 1967) is meant.

soon answered by Nancy Mamis who suggested five persons: Dr. Robert Schwab, neurologist (Boston), Sidney Rosoff, lawyer and member of the Euthanasia Society board of directors (New York), Sissela Bok, who was writing a thesis on ethics and euthanasia (Belmont/Mass.), Dr. Joseph Fletcher, well-known (pro-euthanasia) bioethics pioneer (Cambridge, Mass.), and Paul Moor, author of a forthcoming book pro euthanasia (living in Berlin).³² Kutner thanked Mamis in a letter of September 19, 1967. He spoke of a meeting in New York in the future and his “trust that we will be in close touch henceforward”.³³ The next day, he contacted all the persons Mamis had suggested, but the short exchanges of letters obviously did not lead to any further cooperation.³⁴

In the correspondence there are only two more records of Kutner’s active pursuit of his symposium scheme: a short letter exchange with Dr. Herbert Ratner whom Kutner requested for a contribution to the symposium,³⁵ and one detailed, but – according to the LKP – unanswered letter to Ann

³²Letter of September 14, 1967. Name and address of Paul Moor is not included in the letter but added on a separate paper, with an excuse by Mamis.

³³Letter of September 19, 1967.

³⁴Letter of September 20, 1967. The folder contains written answers by Sissela Bok, Robert Schwab and Joseph Fletcher. Both Bok and Schwab indicated that they could not distribute to Kutner’s project, Fletcher referred to own publications about euthanasia and showed some interest. Kutner ordered Fletcher’s recent “Moral Responsibility: Situation Ethics at Work” (1967), but there is no record of any further correspondence.

³⁵Letter of September 12, 1967 (Kutner to his “distinguished relative” Ratner) and letter of September 27 (answer Ratner). Ratner, who worked in the Department of Public Health at Oak Park/Ill., was an activist of the “National Commission on Human Life”. He fought against active euthanasia, especially abortion, and welcomed Kutner’s euthanasia symposium plans, but not without expressing his hope that “it marks a conjoining of concerns and not a parting at the road”.

Pinchot of August 16, 1967.³⁶ None of these seemed to have any promoting effect on the symposium plans.³⁷

Kutner kept contact to Nancy Mamis and the Euthanasia Society of America. In a letter to Kutner of September 25, 1967 Mamis announced the visit of Ruth Proskauer Smith, vice-president of the Euthanasia Society, in Chicago on Friday 29 and her plans to meet Kutner. There is no record of this meeting. From the later correspondence it can be concluded that it had not taken place.

³⁶In the end of this letter, Kutner addressed Ann Pinchot as favoured “Advisory Editor” for his euthanasia project. Kutner tried to win her for the envisioned symposium publication which he saw “translated throughout the world; and, of course, the pocketbook sales would just be fantastic”.

³⁷The letter to Ann Pinchot is interesting insofar as it contains the most detailed development of Kutner’s scheme of “Merciful Release. A Symposium on Euthanasia. Pro and Con”. Missing encouragement, lack of support by a university or other institution, professional demands or whatever else reasons – Kutner never seems to have returned to his symposium plans after the autumn of 1967.

5. Kutner's speech in New York (December 1967)

However Kutner accepted an invitation to the Euthanasia Society's board meeting on November 2, 1967 which was to be held at New York at the home of "Mrs. Henry J. Mali", the secretary of the society.³⁸

The Chicago lawyer now clearly pursued the presentation of an article on euthanasia. In a letter of October 12 to Mamis, he expressed his hope "to have a formal paper prepared by that time and that, if presented to the group, it might be subject then to publication." The title of the paper: "Due Process of Euthanasia".³⁹

Due to sudden indisposition, Kutner had to cancel his participation on the New York board meeting on November 1, but the telegram lines confirm that he "will continue to serve societies [!] cause".⁴⁰ Indeed, he was eager to send his work on "Due Process of Euthanasia" to Mamis the next day (November 2), with the "permission to publish the article, if you do so desire."

He also asked for information about the possibility of getting published through the society, otherwise he would "seek publishing the paper in a law journal."⁴¹ In fact, on the same day – November 2 – Kutner had sent his

³⁸Letter of October 12, 1967 (Nancy Mamis to Kutner). Box 8, folder "Euthanasia: Speech Dec. 7".

³⁹Letter of October 12, 1967 (Kutner to Nancy Mamis). Box 8, folder "Euthanasia: Speech Dec. 7".

⁴⁰Telegram of November 1, 1967. Box 8, folder "Euthanasia: Speech Dec. 7".

⁴¹Letter of November 2, 1967. Box 8, folder "Euthanasia: Speech Dec. 7".

article “Due Process of Euthanasia” to the University of Pittsburgh Law Review with the request to publish it.⁴²

Only one week later, on November 9, 1967 there was a meeting between Nancy Mamis, Ruth Proskauer Smith and Kutner, according to a letter by Nancy Mamis of November 13⁴³, and the reply by Kutner two days later.⁴⁴

There is no hint at the place of that meeting, but there is clear evidence of one result: Kutner was invited to hold a speech at the annual meeting of the Euthanasia Society on December 7, 1967 in New York. And there is evidence of what they had spoken about: The lawyer obviously had used the opportunity to explain a concept which is mentioned for the first time in the Luis Kutner Papers in his letter of November 15, 1967: “Have you thought about the ‘Living Will’ idea? I shall be happy to enlarge upon it.”⁴⁵

As soon as December 2, Kutner had completed eight pages on the living will concept which were meant to be an enlargement of his paper on “Due Process of Euthanasia”. This can be concluded from two letters Kutner wrote on December 2; enclosed in each letter was the living will chapter. One letter was written to Ruth Proskauer Smith, the other one to Jeffrey Kay, editor of the University of Pittsburgh Law Review.⁴⁶ The subject line reads in both letters identically: “Re: Due Process of Euthanasia: The

⁴²Letter of November 2, 1967. Box 8, folder “Merciful Release or Euthanasia Symposium”. The letter is addressed to Jeffrey A. Kay, Article Editor of the University of Pittsburgh Law Review.

⁴³Letter of November 13, 1967. The date of the meeting can be concluded from the information given here (“It was a great pleasure to meet you last Thursday”).

⁴⁴Letter of November 15, 1967: “... I so enjoyed being with you and Mrs. Smith. Such marvellous dedication ...!”

⁴⁵Ibid.

⁴⁶Letter of December 2, 1967 (Kutner to Nancy Mamis). Box 8, folder “Euthanasia: Speech Dec. 7”. Letter of December 2, 1967 (Kutner to Jeffrey Kay). Box 8, folder “Merciful Release or Euthanasia Symposium”.

Living Will, A Proposal.”⁴⁷ In both cases, Kutner asked to substitute page 1 of his article for the enclosed revised one. He continued: “Also enclosed is an addition to this piece of Pages 28 to 36. Please note that the page numbering of the Footnotes should be adjusted accordingly.”⁴⁸ The page numbering Kutner had given here corresponds with the numbering of two typewritten copies of “Due Process” – a fair copy and one with manuscript corrections – which are contained in the LKP.⁴⁹ Both include the new living will chapter⁵⁰ and give an insight into the work of progress and the extent of “research assistance of Ernest Katin.”⁵¹

⁴⁷The subject line of the letter of November 2, 1967 (Kutner to Kay) reads: “In Re: Due Process of Euthanasia”.

⁴⁸These lines are identical in both letters. An obvious mistake is the misspelled number 26 for 36 in the letter to Ruth Proskauer Smith.

⁴⁹Box 8, unnamed folder. The note “Please redo by Monday 10/30” on the copy with handwritten corrections and annotations allows a more accurate determination of the date of its completion.

⁵⁰The chapter heading on page 28 reads “The Living Will or ‘body Trust’”, unlike the shorter “Living Will” heading in the published article of 1969.

⁵¹“The research assistance of Ernest Katin, Ph.D.” is acknowledged on the first page of the published article of 1969, together with the biographical note on Kutner. The corrected manuscript version makes clear that Kutner linked Katin’s assistance only with the Robert Waskin case and footnote 1 (letter from Patrick A. Tuite). Tuite’s letter of October 17, 1967 (LKP, Box 8, unnamed folder) with references to the indictment against Waskin is indeed addressed to “Dr. Ernest Katin”. But this is not the only help Kutner received from Katin for his article. An early note by Kutner’s secretary of August 16, 1967 (Box 8, folder “Living Will”) reads: “Re: Euthanasia ... Dr. Katin highly recommends the article by Professor Yale Kamizar [! recte: Kamisar]”. Katin must have studied Kamisar’s article very well, according to a second note “In Re: ‘Due Process of Euthanasia’” of March 13, 1969 (Box 8, folder “Merciful release or Euthanasia Symposium”). The note starts with “Dr. Katin telephoned ... the following”, it is signed by “EK/jb” (most probably Ernest Katin and secretary Jeanette). The text replies in three elaborate paragraphs to questions by Nicholas Brown, editor of the *Indiana Law Journal* (letter of March 11, *ibid.*). Brown saw overt

Kutner added to the letter to Ruth Proskauer Smith: “Looking forward to seeing you on December 7”. This is the last letter extant between Kutner and the Euthanasia Society in the time before the annual meeting of the Euthanasia Society.

The annual meeting of the Euthanasia Society of America on December 7, 1967, with Kutner’s speech is documented by a non-personalized typewritten invitation letter.⁵² The printed heading of the invitation bears a long list of names, from the president Donald W. McKinney, his vice presidents Florence Clothier and Ruth Proskauer Smith and secretary “Mrs. Henry J. Mali” to the board of directors (including Joseph F. Fletcher), an extensive advisory council (including Henry Pitney Van Dusen, the former president of the society) and “Mrs. Justin E. Mamis” as executive secretary. The text of the invitation reads: “You are cordially invited to attend the annual meeting of the society on Thursday, December 7, 1967 at 6 p. m. ...” Location and treatment tell of the festive character of the meeting,⁵³ which had one single item on agenda: “Euthanasia and Due Process of Law”. The speaker was Luis Kutner, the discussants William Rial, a medical doctor (Philadelphia, Penn.), Sidney D. Rosoff, attorney (New York), and the churchman Henry Pitney Van Dusen.

overlappings between Kutner’s article and Kamisar’s and assumed Kutner might have been unaware of them “because you acknowledged research assistance”. Kutner’s answering letter to Brown (March 13, *ibid.*) uses Katin’s three paragraphs unaltered and without acknowledgement.

⁵²Box 8, folder “Euthanasia: Speech Dec. 7”.

⁵³The meeting took place at a restaurant dining room, Madison Avenue, New York and was combined with a dinner and “Dutch treat cocktails”.

6. Delayed publication

Kutner pursued his plan to publish “Due Process of Euthanasia” soon after his speech. On December 14, 1967, he wrote again to Jeffrey Kay in Pittsburgh: “On December 7, 1967, I delivered the subject paper (which you have in your possession contemplating publication in your Law Review) before the annual meeting of the Euthanasia Society of America, Inc.: in New York City. I felt sure you would want to add this fact as a footnote on the first page.”⁵⁴

He wrote again on January 23, 1968, to ask for the present state of his request for publication. Obviously, he had not received any answer to all of his letters, so he called Jeffrey Kay on February 19, and wrote again on February 26, 1968. Indignant at the way he had been treated, he now listed all his diverse letters to Kay and his telephone call and wrote: “I am completely at a loss to understand this kind of gross negligence or basic lack of courtesy. I should like to have an immediate reply as to whether or not you lost the article or decided not to publish it. If the latter is the case, kindly return the manuscript.”⁵⁵

The correspondence is concluded by a short, undated letter by Kay: “Enclosed is your manuscript ‘Due Process of Euthanasia’ which we do not plan to publish.”⁵⁶

Subsequently, Kutner tried to find another publication organ. But only after three more negative responds from the George Washington Law Review,

⁵⁴Box 8, folder “Merciful Release or Euthanasia Symposium”.

⁵⁵Ibid. A copy of this letter was sent to the “editor-in-chief” of the Pittsburgh Law Review.

⁵⁶Ibid.

the Columbia Law Review, and the Northwestern Law Review,⁵⁷ did Kutner receive a positive response by the Indiana Law Journal on September 30, 1968.⁵⁸

Due to some delay on the part of the law journal and lack of cooperation on the part of Kutner, it took until summer 1969 until “Due Process of Euthanasia: The Living Will, A Proposal” was finally published in print.

⁵⁷This was in the time between March 5, and July 18, 1968. Ibid.

⁵⁸Letter by the editor Nicholas K. Brown of the Indiana Law Journal to Kutner.

7. Kutner's article (1969)

In his “Due Process of Euthanasia: The Living Will, A Proposal” Kutner stated that the “law in regard to euthanasia leaves much to be desired” (p. 542). He referred to the proposals of the euthanasia societies in England and in the United States, which allowed “voluntary” euthanasia if the patient had a written petition (p. 544). Kutner called these proposals “cumbersome and bureaucratic”. He suggested not to legalize euthanasia formally but to treat the accused persons in a milder way than murderers: “The suggested approach is to adopt the standard of motive as indicated by the codes of other legal systems. The punishment for an accused who killed at the request of the victim, where the victim was suffering from an incurable disease and was in great pain, would be milder than in other incidents of homicide. A somewhat harsher, but still mild punishment, would be inflicted upon the accused who killed where the victim did not request to be killed or was incapable of giving his rational consent, but was suffering from an apparent physical or mental affliction and there was no element of malice or personal gain” (p. 549). This can be read as a hint that Kutner, although not a radical “euthanasiast”, had at least some sympathy⁵⁹ with the propagators of “death on request” and active euthanasia.⁶⁰

In the subsequent part of the text Kutner introduced the concept of the living will (as we have seen above, this part was added after the first draft).

⁵⁹Kutner repeated this statement in a paper from 1979, now inserting a quite significant “if punished at all”: “So, if the renderer of euthanasia has good motive he will be punished – if punished at all – for a lesser offence than murder” (Kutner 1979, p. 222).

⁶⁰But Kutner stressed that a living will “authorizing mercy killing” “as of now” would be “contrary to public policy” (Kutner 1969, p. 553).

Kutner referred to the patient's right "not to be subjected to treatment without his consent" (p. 550). According to Kutner, this "right of privacy" did not lose its validity when a person was not anymore of "sound mind and disposing memory": "[...] the suggested solution is that the individual, while fully in control of his faculties and his ability to express himself, indicate to what extent he would consent to treatment. The document indicating such consent may be referred to as 'a living will', 'a declaration determining the termination of life', 'testament permitting death', 'declaration for bodily autonomy', 'declaration for ending treatment', 'body trust', or similar reference" (p. 551). According to Kutner, the document should be "notarized and attested by at least two witnesses" (p. 551). Each individual case according to Kutner "would be referred to a hospital committee, board or a committee of physicians. The committee or board would consider the circumstances under which the document was made in determining the patient's intent and also make a determination as to whether the condition of the patient has indeed reached the point where he would no longer want treatment" (p. 551).

Kutner published four more articles about the topic:

1) The Living Will Coping with the Historical Event of Death. In: *Baylor Law Review* 27 (1975), p. 39–51,⁶¹

⁶¹The "appendix" to Kutner's article ("A Plea for Beneficent Euthanasia", p. 51f.) was not written by Kutner; it is identical with Marvin Kohl, Paul Kurtz: *A Plea for Beneficent Euthanasia*. In: Marvin Kohl (ed.): *Beneficent Euthanasia*. Buffalo, New York 1975, p. 233–236; according to this publication Kutner was not among the signers of the declaration, see p. 237f. According to Dowbiggin 2003, p. 128, "A Plea for Beneficent Euthanasia" (which was signed among others by Noble prize winner Linus Pauling) had been published in the American Humanist Association's journal "The Humanist" already in 1974.

2) Die Verfügung zu Lebzeiten – Zur Bewältigung des historischen Vorgangs Tod. In: Albin Eser (ed.): Suizid und Euthanasie als human- und sozialwissenschaftliches Problem. Stuttgart 1976, p. 360–367;⁶²

3) Euthanasia: Due Process for Death with Dignity; The Living Will. In: Indiana Law Journal 54 (1979), p. 201–228;

4) The Living Will: The Epitome of Human Dignity in Coping With the Historical Event of Death. In: University of Detroit Law Review 64 (1987), p. 661–686.

In these articles Kutner followed the same lines of argumentation he had drawn in 1967 respectively in 1969. For example, in 1987 he wrote in the University of Detroit Law Review: “The Living Will is a means for the individual to manage his death by protective guidelines and is premised on the informed consent of the person prior to an irreversible coma or a state of being disabled or maimed. It is based on the right of privacy – the individual’s right to self-determination of his body” (p. 662).

⁶²This is an abbreviated German version of the Baylor Law Review article.

8. The ESA adopts the living will

We do not know what happened directly after Kutner's presentation at the meeting of the ESA in December 1967. The LKP contain no records from December 1967 and 1968 about Kutner's speech and the following discussion. But it is certain that the ESA/EEF adopted Kutner's idea.⁶³ This view is supported by A. J. Rock Levinson, who was executive director of the Euthanasia Educational Council in 1979. She wrote: "In 1968 at the instigation of Luis Kutner, a lawyer, five individuals including two Euthanasia Educational Council board members, composed documents expressing their wishes for treatment, and the withholding of treatment, during terminal illness. From these, a 'Living Will' was devised, which has been distributed by the Euthanasia Educational Council since 1969."⁶⁴ This may well be true, although we do not know for sure.

But we know for sure from documents in the Luis Kutner Papers, that in February 1969 at the latest, the Euthanasia Educational Fund had prepared a form entitled "A Living Will".⁶⁵ This form was sent to members of the

⁶³Nota bene: We did not find a mention of the Simon or Wolbarst concepts for an advance declaration in this context. For Simon and Wolbarst see above, footnote 7.

⁶⁴A. J. Rock Levinson: *An Overview of the Euthanasia Movement in the United States Today*. In: Andre de Vries, Amnon Carmi (eds.): *The Dying Human*. Ramat Gan 1979, p. 311–322, here p. 312.

⁶⁵The ESA form is as follows: "To my family, my physician, my clergyman, my lawyer – If the time comes when I can no longer take part in decisions for my own future, let this statement stand as the testament of my wishes: If there is no reasonable expectation of my recovery from physical or mental or spiritual disability, I ... request that I be allowed to die and not be kept alive by artificial means or heroic measures. Death is as much a reality as birth, growth maturity and old age – it is the one certainty. I do not fear death as much as I fear the

Euthanasia Educational Fund and to other people along with a letter by EEF president Donald W. McKinney. Among the “other people” was Luis Kutner, who received a letter without a personal form of address (“To Those Concerned”) and without a date. Kutner was not pleased by this letter, as we can guess, because his name and his presentation in 1967 were not mentioned.⁶⁶ Why Kutner was “suppressed” here is not clear.

We could not specify when Kutner devised the first living will for a definite person.⁶⁷ We only know that at least at the beginning of 1975 Kutner had composed a living will standard text which he used as a

indignity of deterioration, dependence and hopeless pain. I ask that drugs be mercifully administered to me for terminal suffering even if they hasten the moment of death. This request is made while I am in good health and spirits. Although this document is not legally binding, you who care for me will, I hope, feel morally bound to follow its mandates. I recognize that it places a heavy burden of responsibility upon you, and it is with the intention of sharing that responsibility and of mitigating any feelings of guilt that this statement is made. Signed ... Date ... Witnessed by ...” (LKP, Box 8).

⁶⁶McKinney wrote: “To Those Concerned – Are you one of the people who is concerned about your life as it nears its end? If so, the Euthanasia Educational Fund has profound meaning to you. The purpose of the Fund is to encourage the discussion and exchange of ideas about the termination of life in a peaceful way. One important step in this direction was taken at our stimulating and informative Conference held in November of ’68 at the Carnegie Endowment Center in New York City. A distinguished panel of lawyers, physicians and nurses spoke from their professional viewpoints. Summaries of these talks will be available at nominal cost in the near future. As part of our expanding educational program we have prepared ‘A Living Will’, which is enclosed. Although it is not a legally binding document, at this time it is our only means of expressing our wishes while we are still able [...]” (LKP, Box 8).

⁶⁷Kutner received a telephone call from a “Honorary Colonel of the American Heritage Poetry Society” on April 18, 1969 (LKP, Box 8). That man professed to have heard Kutner “when he talked before the Euthanasia Society” in New York in December 1967. He wanted to be “put to sleep” (!) and asked Kutner for the names of two doctors to check his “stability to perform own judgment [!]”. Most likely Kutner did not devise a living will for the “Colonel”.

standard form and which he then disseminated.⁶⁸ The main difference between the Kutner form and the ESA/EEF form was that Kutner wanted a board (a “non-judicial” euthanasia board) to decide if the conditions formulated in the living will were fulfilled. It also should be noted that Kutner used the quite open term “any appropriate method of euthanasia” in his form.⁶⁹

⁶⁸Kutner sent a living will form (with handwritten additions resp. corrections) to his close friend Harold D. Lasswell on February 3, 1975 (LKP, Box 219). Lasswell “executed it shortly after it came” and sent a copy to Kutner (see letter from Lasswell to Kutner, March 7, 1975, LKP, Box 219). On February 3, 1975 Kutner also sent a (typewritten) living will form to R. Koselleck, who (together with A. Eser) organised a symposium on euthanasia and suicide in Bielefeld in March 1975 (LKP Box 5). The form Kutner sent to Koselleck reads as follows: “Living Will of John Doe, Declarant: I,..., of the City of ..., State of ..., U.S.A., Declarant, being of sound mind and disposing memory, herewith make this, my living will, to be effective upon the following conditions: 1) That when an event occurs wherein it appears that I am physically or physiologically irreversibly ill, maimed or disabled, I request that a non-judicial board be convened comprised of three duly accredited Doctors of Medicine, a member of the Clergy of my faith (...), and two lay persons; 2) That after total evidence has been presented as to my irreversible condition, and under my constitutional rights against cruel and inhuman punishment, right to privacy, and my right to determine the integrity of my person, I then direct and request that I be given any appropriate method of euthanasia. In so doing, I hold harmless and exonerate the members of my euthanasia board, individually and collectively; 3) That in the event legislation is in force authorizing the existence and functioning of a euthanasia board, as suggested, in substance, above, I agree to be bound by the legislative parameters. 4) If I am adjudicated as mentally incompetent, then this living will shall be null and void. I herewith subscribe to my living will, this ... day of ...19.., in the presence of my two witnesses, who shall Attest to my sound mind and disposing memory, and shall so Attest in my presence and the presence of each other” (LKP, Box 5). In the Lasswell version Kutner wrote in section 2 “under the constitutional rights and my right to determine the integrity of my person”. Section 4 is missing in the Lasswell version.

⁶⁹After he had become well known through his television, radio and newspaper interviews in the second half of 1975, Kutner answered many requests for the

Another confirmation that the ESA/EEF adopted Kutner's idea is an exchange of letters between Kutner and Katharine (Kay) Mali from 1975 extant in the LKP.

Almost eight years after his speech Kutner received a letter from Katharine Mali, then president of the Euthanasia Educational Council.⁷⁰ The major concern of her letter from November 7, 1975 was a request for detailed information about Kutner's successful campaign of spreading living will forms. Mali introduced her request with the words: "We have thought so often of the man who suggested the idea of the Living Will, and who gave it its name." She declared his speech of December 1967 to be the decisive impetus for the Society's living will campaign: "We first became aware of the idea when you spoke at the annual meeting of what was then called the Euthanasia Society of America in 1967. After that we drafted a Living Will ...". She then reported that the Society's living will form since then "has been revised once or twice, and has now reached what we hope is its final form." Referring to Kutner's appearance "on television recently" and his statement to have "drawn up 600 Living Wills,"⁷¹ Mali put two questions: Does Kutner use a "standard form" or does he modify the living wills individually? How is he able to maintain "that 43 of your Living Wills had been honoured" which "is an extraordinarily high percentage. Do you ask that the signer's next of kin let you know?" Mali enclosed a copy of the Council's current version of the living will "in case you are not familiar with it" and asked for Kutner's form. The letter ended "with all good wishes for the splendid work you are doing."

living will form, which might well have been more than 200, according to the LKP.

⁷⁰Letter of November 7, 1975. Box 93, folder „Living Will Correspondence“.

⁷¹In brackets she wrote: „I hope this is correct – you were on all too briefly“.

Kutner answered in a two-page letter of November 11, 1975.⁷² Quite at the beginning, he took up Mali's recalling of his speech on December 7, 1967: "I remember quite well when I presented the living will concept at your meeting in 1967." He answered Mali's second question,⁷³ only to add information and suggestions which reached far beyond her request. Obviously, Kutner's main concern was that the Euthanasia Educational Council adopts his own living will form instead of the Council's: "With all due respect to your enclosed living will, I believe if you were to adopt my form, it would include the cautionary protection which is necessary to have doctors act upon it" (p. 1). The request is repeated by the end of the letter, this time reinforced with legal arguments and the hint that his own draft "has stood up to the test of actuality and reality."⁷⁴ Kutner even returned to it again, referring to the Council's plans "that the living will will be included in the 1975 Edition of Modern Legal Forms." Kutner made clear that instead of the Council's, he wished to see his own form included in that collection.⁷⁵

In this letter from November 11, 1975 Kutner also explained the concept of his "Next of Kin Living Will", referring to its significance in cases like

⁷²Letter of November 11, 1975. Box 93, folder „Living Will Correspondence”.

⁷³"I usually make a request of those who have the wills to have their doctors or next of kin call me in the event the living will is honoured." (Letter of November 11, 1975, p. 1).

⁷⁴The whole passage reads: "I believe, as a matter of law and consistent with the constitutional guarantees in the first, eighth and fourteenth amendments, in the validity of my concempt [recte: concept] of the living will. I recommend that the Council substitute, with my permission and best wishes, my draft since it has stood up to the test of actuality and reality" (Letter of November 11, 1975, p. 2).

⁷⁵"I would suggest, with all due modestly [!], if you so desire, use my form" (Letter of November 11, 1975, p. 2).

Karen Quinlan's (p. 1), and offered it to the Council for free use (p. 2).⁷⁶ With emphasis, he pointed to his own publications on euthanasia and the living will and to the euthanasia conferences of Baylor University (1974) where he was "the climax speaker" (p. 1), and Bielefeld University (1975) to which he contributed with a paper. He also mentioned his article "Due Process of Euthanasia". Conspicuously, Kutner did not refer to it as the published form of his speech on December 1967 before the Euthanasia Society. He only enclosed a reprint and suggested that Mali "can disseminate" it at her discretion (p. 1).⁷⁷

A suggestion at the end of Kutner's letter reminds us of his former plans of summer 1967 to organize an international symposium on euthanasia: "When you finish with the symposiums I have recommended, it might be of interest to the Council to have a worldwide symposium conference as a further catalyst in our movement" (p. 2).

It is all too obvious that Kutner thought of intensive future cooperation with the Council. He even suggested another presentation before the Council: "I would be most happy to address your Council again, at which time we could update our prerequisites" (p. 1).

The Chicago lawyer apparently wanted to bridge the long-standing communication gap between him and the Euthanasia Society resp. the Euthanasia Educational Council. Kutner also asked for back copies of the Council's Bulletins and requested to be included on the mailing list.⁷⁸ All these facts support the conclusion that Kutner was not a member of one of

⁷⁶Maybe Kutner was the first who had this special idea!

⁷⁷We are not informed whether Kutner had provided the Euthanasia Society – and its secretary Kay Mali – with this article when it was published in Summer 1969.

⁷⁸"Please send me all the Bulletins of the last several years, and put me on your mailing list" (Letter of November 11, 1975, p. 2).

the Euthanasia societies and not in closer contact to one of its protagonists during the years 1968 to 1975.⁷⁹

From the lack of any further correspondence between Mali and Kutner in the LKP and a most angered letter by the lawyer to “Dear Mr. Director” [of the Euthanasia Council] of May 9, 1977,⁸⁰ we may conclude that Kutner’s attempts to cooperate with the Council failed completely.⁸¹

⁷⁹We have found no evidence that Kutner became a member of ESA or EEF/EEC as is alleged by Rita Marker: *Deadly Compassion*. New York 1993, p. 4 and Marilyn Webb: *The Good Death. The New American Search to Reshape the End of Life*. New York et al. 1999, p. 170.

⁸⁰Letter of May 9, 1977. Box 93, folder „Living Will Correspondence”.

⁸¹Kutner wrote: “Dear Mr. Director: I have in my hand a book entitled “Beneficent Euthanasia” [published in 1975; U. B., G. H.-M.], and I note, that one Mary Rose Barrington takes credit for the living will on page 246. [...]. Since I am the author of the living will, which was first conceived in 1930 and formalized in 1950 before being recognized by the Euthanasia Council in 1967 – I invite your good offices to correct the record. It appears that the forms submitted by the Euthanasia [!] Council do not comply with my safeguard form, copies of which are enclosed. Since it distorts my living will form, I request that you either use my living will form or state that the form given by the euthanasia council is not my form. I also [!] request that the Euthanasia Council use my living will form and also my next of kin living will, which I believe will round out the whole movement of the right to die [...]” (LKP, Box 93).

9. Excursus: The development of the living will between 1968 and 1975

In 1968, Kutner was occupied to get his article on euthanasia and the living will published (see above).

We do not know how the discussion on the living will developed among the members of the ESA/EEF in 1968.⁸²

We also do not know what happened in Florida in 1968 with regard to the living will resp. passive euthanasia. According to McDougall/Gorman, in 1968 Walter Sackett, a retired physician and member of the Florida House of Representatives, began “introducing legislation about living wills and other end-of-life-issues”.⁸³ But this allegation has to be verified. Was it really a living will legislation Sackett proposed in 1968?⁸⁴ In his article “Death with Dignity”, based on a speech held before a joint meeting of the Sections on Pathology and General Practice, Southern Medical Association, November 10–13, 1969 in Atlanta, Sackett wrote that he had

⁸²Maybe the issue of the living will was discussed in the context of the EEF conference in November 1968 at the Carnegie Endowment Center in New York City. Kutner obviously did not attend the meeting. The conference is mentioned in a letter from Donald W. McKinney “To Those Concerned” (no date) (LKP, Box 8). For more on this letter see chapter 8.

⁸³McDougall, Gorman 2008, p. 104.

⁸⁴Dowbiggin 2003, p. 122 only mentions that between “1968 and 1974” Florida physician Walter Sackett, a Democratic state representative, tried in vain to get the Florida legislature to pass bills enacting passive euthanasia and include the ‘right to die with dignity’ in the state’s bill of rights”. Nota bene: According to Garrett 1998, p. 135, there was “also a failed 1968 Washington bill, introduced by law professor Arval Morris, which would have allowed patients to request ‘that death be allowed or induced [!] if [the patient] should become irreparably impaired, either physically or mentally’” (Garrett referred to Richard Trubo: *An Act of Mercy: Euthanasia Today*. Los Angeles 1973, p. 43).

seen people kept “needlessly alive” over a long period of time.⁸⁵ According to this article, he had “impulsively entered a bill during the special constitutional amendment session of 1968, during a discussion of the Basic Rights Act” (p. 330). The bill “sought to insert the right to ‘die with dignity’” (p. 330). It was turned down, but Sackett introduced the bill in the 1969 session of the Florida Legislature again (p. 331). This time it was assigned to a General Legislation Committee. According to Sackett, for the 1970 session he introduced a variation of this proposal, now trying to enact it into the statutes, and not into the constitution (p. 331). The 1970 proposal would have provided that a person “in his right and rational mind could create a document, much as a will or a deed, to be registered with the appropriate local authority that would allow him under certain provisions, which he could dictate [...], under what circumstances he would be allowed to die” (p. 331), but it was turned down.⁸⁶ We have to leave the question open, whether Sackett’s 1968 proposal included an advance directive. And we also don’t know how Sackett came to develop his proposals.⁸⁷

What we know for sure is that in 1969 the ESA started a campaign for the living will by sending out a living will form (see above).⁸⁸ Maybe this form was devised in 1968.

⁸⁵Walter Sackett: Death with Dignity. In: Southern Medical Journal 64 (1971), p. 330–332. Neither Kutner nor ESA are mentioned here.

⁸⁶California’s Natural Death Act (1976) was the first state law which allowed patients to set forth their wishes for care at the end of their lives (see McDougall, Gorman 2008, p. 105).

⁸⁷Most likely Sackett had not had contact with Kutner. Whether he had contact with the ESA in 1968 has to be left open.

⁸⁸Dowbiggin 2003, p. 121 mentions that an EEF committee printed 5,000 copies of the form. He refers to Kutner’s article from 1969, but in this article there is no mention of the ESA form.

We also know for sure that in summer 1969 Kutner's ground-breaking article on the living will was published in the *Indiana Law Journal* (see above), a journal which was, of course, not widely read.

The effects of the ESA/EEF campaign (1969ff.), of Kutner's publication (1969) and of various activities to spread the living will idea during the first half of the 1970s⁸⁹ were outweighed by an episode which attracted media attention nationally and internationally: the Karen Ann Quinlan case.⁹⁰ It should bring the breakthrough for the living will, although Quinlan had never signed such a will.

On April 15, 1975 the twenty-one year old Quinlan fell into a coma.⁹¹ She persisted in a vegetative state for months. The case went public when in September 1975, the attending physicians refused her father's plea to take her off the respirator. Her parents went to court. They eventually succeeded in March 1976 at the New Jersey Supreme Court. But Quinlan, after being detached from the respirator, lived for another nine years until she died of pneumonia in 1985.

⁸⁹Maybe the most effective publication with regard to the distribution of the living will before the Quinlan case was a "Dear Abby" column (Abigail van Buren: Some Thoughts on a "Good Death", Universal Press Syndicate, 1 April 1973), which promoted the living will (Dowbiggin 2003, p. 121). After the column was published, the EEC received thousands of letters with requests for a living will form (Dowbiggin 2003, p. 211).

⁹⁰See Dowbiggin 2003, p. 146.

⁹¹See Everett C. Koop: The Case of Karen Quinlan. In: Robert M. Baird, Stuart E. Rosenbaum (eds.): *Euthanasia. The Moral Issues*. Buffalo 1989, p. 35–43.

10. Kutner's different versions of the birth of the living will idea

It is evident that the Quinlan case rekindled Kutner's interest in propagating the living will concept, although his activities had never totally declined. For example, he had presented his concept at the Baylor Law Review/State Bar of Texas Symposium "Death with Dignity" (November 8, 1974) in Waco, Texas.⁹²

After the Quinlan case became public (in September 1975), Kutner often gave interviews or wrote on the topic of the living will. Quite interestingly, he told different stories regarding the birth of the living will idea. In this chapter we have tried to sort out the diverse assertions spread out in newspaper articles or other records in the LKP chronologically.

From Katharine Mali's letter of November 7, 1975 we know that she had seen Kutner on television. Kutner was on CBS news on October 24, 1975,⁹³ where he was interviewed by reporter Sharon Lovejoy. The lead-in to the Quinlan case and the Living Will concept reported: "The Living Will was first conceived in 1929 by Chicago attorney Luis Kutner."⁹⁴ There is no other date mentioned, neither by the interviewed Luis Kutner nor the journalist.

On November 6, 1975, an Associated Press article appeared in the San Francisco Chronicle under the title „A Champion of The Right To Die“.⁹⁵ It referred to the new attention "Euthanasia and the living will have gotten [...] recently because of the case of Karen Anne Quinlan [...] whose

⁹²Letter of Kutner to Steven F. Bright from June 4, 1974, LKP, Box 5.

⁹³Exchange of letters between Kutner and CBS between October, 29 and November 18, 1975. Box 93, folder „Living Will Correspondence“.

⁹⁴Vanderbilt Television News Archive (Nashville), TV News Record 237362.

⁹⁵Box 93, unnamed folder.

parents have asked the courts to allow her to die.” The interview based article is devoted to Luis Kutner: “A lawyer who watched the lingering death of his parents began working 26 years ago to ensure that persons who had medically become ‘vegetables’ could die with dignity ... It was then that Luis Kutner [...] began to develop the ‘living will’ [...].”⁹⁶

There are more references from Kutner to the time around 1950 as being the birth-year of the idea of the living will.

On November 17, 1975 Luis Kutner wrote to the journalist Irving Kupcinet of the Chicago Sun-Times, reacting to an article on the Karen Quinlan case. Kutner complained about the “cryptic fashion” of the Sun-Times article and provided Kupcinet with information about the living will “which I authored and conceived in 1950.”⁹⁷

On December 1975, two records in the LKP speak of 1949 as the decisive year: a letter to Louis A. Rosenthal of December 1, 1975, and a “news release” of December, 9.⁹⁸ The latter, probably drafted by Kutner himself,⁹⁹ reads: “The Karen Quinlan case has given worldwide impetus to the living will originated by Chicago attorney Luis Kutner in 1949.” The same date is

⁹⁶June Sawyers quoted Kutner in her article “Right to death with dignity is lawyer’s quest” (Skyline, Chicago/Ill., August 1, 1985) as follows: “My mother was in the same spot for 2 ½ years in a bed. My dad, almost a year. The doctors wouldn’t do a thing about (allowing them to die) so I went and did it myself. My father smiled at me. I said, ‘Papa, I’m going to kiss you goodbye. See you in heaven.’—‘My dad was 61, a handsome guy shrivelled down to nothing. My mother was a gorgeous woman crumpled up like a little bird. It was barbaric. There must be a dignity of death.” This can be read (“so I went and did it myself”) as if Kutner has “helped” at least one of his parents actively to die.

⁹⁷Letter of November 17, 1975. Box 93, folder „Living Will Correspondence”.

⁹⁸Box 93, folder „Living Will Correspondence”.

⁹⁹The news release has no addressor and is not signed, but the Kutner origin is very likely (due to location, style, typology, paper quality etc.). A handwritten note says “to Aaron Gold”.

emphasized by an article written by Luis Kutner himself and published on April 9, 1976 in the Chicago Daily Law Bulletin.¹⁰⁰ Here Kutner speaks of “the compassionate concept of the ‘living will’, which I originated in 1949.” No proof is given.

On May 9, 1977 Kutner wrote to the “Director Euthanasia Council” without further comment (see above): “[...] I am the author of the living will, which was first conceived in 1930 and formalized in 1950 before being recognized by the Euthanasia Council in 1967.”¹⁰¹

One year later, in April 1978, there is more detailed information in an article in The News Dispatch, Michigan City.¹⁰² Kutner mentioned the suffering of a close friend as a trigger for his thoughts on the living will. This friend “was fatally wounded”. Kutner is cited: “My friend said to me, ‘Don’t have them prolong my dying process.’ That was the phrase he used and I always remembered it. When he died, I began talking about it.” According to the article “that was in 1930 and the beginning of Kutner’s 20-year struggle to gain support for his concept of a ‘living will’”.

Several years later, Kutner told the story again. Now he mentioned the name of the friend. In an AP-article published on September 18, 1984 in the Peoria Journal Star the story is as follows: “Kutner’s involvement with the issue began in 1927, when his friend and mentor, Dr. George Thilo, was attacked and fatally beaten while answering a phony house call”.¹⁰³ Given the name, the story can be proved by several newspaper articles from

¹⁰⁰Box 5, folder “Publicity – Newsclips”. The title of this three-columned article is “Finds support for concept of ‘living will’ in Quinlan ruling”.

¹⁰¹Box 93, folder “Living Will Correspondence”.

¹⁰²Leo Morris, “‘Living Will’ would provide death with dignity: Kutner”. The News Dispatch, Michigan City, April 11, 1978, p 1, col. 2–5. Box 5, folder “Publicity – Newsclips”.

¹⁰³Box 219.

March 1930, when three young men were sentenced to 14 years for the murder of the medical doctor George W. Thilo, Chicago.¹⁰⁴ But: The attack on the 40-year-old Dr. Thilo had taken place not in 1927 but in December 1928.¹⁰⁵ Most likely Thilo died in 1929. Kutner obviously had given the wrong date.

In the above quoted article in *The News Dispatch*, Michigan City of April 1978, Kutner is quoted with new “facts”: “But I lectured [on the living will], I talked, I persuaded ... and it took 20 years [from around 1930]”.¹⁰⁶ This is further explained: “The first major acceptance of the idea came in 1950, when it was endorsed by the National Euthanasia Council in New York City.” We could not detect a “National Euthanasia Council” in New York City in 1950; there are only two explanations we can offer for the obvious error: either Kutner had remembered something wrongly or the reporter had gotten Kutner wrong.

There are more records in the LKP on the living will history, published later than the Michigan News Dispatch article of 1978. None of them mentions the years 1949 or 1950, with the exception of one article which comes near to it.

It is the article “Living Wills” by Julie Ridenour, published in *The Grand Rapids Press*, Michigan, on March 9, 1986.¹⁰⁷ In a separate box devoted wholly to Luis Kutner, she wrote about the assault on George Thilo (in

¹⁰⁴Decatur Herald, Illinois of March 18 and 20, 1930; *The Vidette Messenger* (Valparaiso, Indiana) of March 20, 1930.

¹⁰⁵Decatur Herald, Illinois of March 20, 1930: “Mrs. Charlotte Thilo, widow of the doctor and the only eye witness to the holdup in December, 1928, wept when the verdict was returned.”

¹⁰⁶Leo Morris, “‘Living Will’ would provide death with dignity: Kutner”. *The News Dispatch*, Michigan City, April 11, 1978, p 1, col. 2–5. Box 5, folder “Publicity – Newsclips”.

¹⁰⁷Box 239, folder “Printed matter Living Will”.

1927!) and Kutner's efforts to spread his living will concept which "began to gain ground more than 30 years ago when he met Bishop Fulton J. Sheen, of New York, who became the first Catholic official to sign a living will." Again, no proof is given for the (highly unlikely) assertion that Bishop Sheen had signed an advance directive in the 1950s. In the following, Kutner is quoted with the words: "Finally Pope Pius XII issued a decree in 1951 [!], endorsing the idea of the living will, saying that the church does not condone the prolongation of the dying process where the person involved is irreversibly maimed or disabled. The church is concerned with human compassion, the living will has all the safeguards there', he said." Most likely Kutner (or the reporter) have put that wrong. As far as we know, the year 1957 is meant in which Pope Pius XII announced that patients could refuse extraordinary treatment to prolong their lives.¹⁰⁸

This story around the beginning of the 1950s is not repeated in detail in any of the other records in the LKP. Instead, the explanations around the years 1927 and 1930 are variously extended. An Associated Press article of September 1984, repeating the incident of "1927" (!), offers the following story: "Three years later, Kutner helped found an American chapter of the Euthanasia Society, modeled after an English counterpart that included such members as playwright George Bernard Shaw, author Julian Huxley and economist Harold Laskey [recte: Laski]."¹⁰⁹ This allegation has no basis in fact as the Euthanasia society of America was founded not in 1930

¹⁰⁸See for example Dowbiggin 2003, p. 98.

¹⁰⁹"Living will is living legacy" (AP). Peoria Journal Star, September 18, 1984. The same article with slight modification was published under the title "Why prolong dying? Living will's originator reflects on progress" in Portland Press Herald, Maine, September 20, 1984. Both articles in Box 227, folder "Clippings Living Will".

but in 1938 (see the Excursus above). And it should be noted that there are no traces showing Kutner was involved in the founding process. Furthermore, the AP article proclaims another important living will stage – the year 1945. Kutner is cited with the words: “We’ve come a far way from the day when I was supposed to speak about the living will at Yale (University in 1945) and students asked me beforehand, ‘Are you the Mercy Killer?’”¹¹⁰ (Kutner was visiting professor at Yale University, but we have no proof of his assertion.)

One year later, “Right to death with dignity is lawyer’s quest” by June Sawyers followed the line of the AP article and repeated the alleged founding story of 1930, but gave one major extension: “The idea found little support, however, until 1938, when the Rev. Charles Potter founded the Society for the Right to Die [recte: ESA], Kutner says.”¹¹¹

The latest printed article on Kutner’s living will history in the LKP is of May 23, 1988 – five years before Kutner’s death. It was published in the Los Angeles Times and repeated the Thilo story.¹¹² The only year mentioned is 1930, and it is strongly linked with the idea of the first *written* living will draft.¹¹³

¹¹⁰This passage is only printed in the Peoria Journal Star article, September 18, 1984.

¹¹¹June Sawyers, “Right to death with dignity is lawyer’s quest”. Skyline, Chicago, Ill., August 1, 1985. Box 227, folder “Clippings Living Will”.

¹¹²Myrna Oliver, “Right-to-Die Laws Take on New Life”. Los Angeles Times, May 23, 1988. Box 227, folder “Clippings Living Will”.

¹¹³“So Kutner devised what he called a ‘living will’, an informal, written statement asking that no heroic measures be taken when death appears inevitable.”

11. Summary

It is well known that Luis Kutner (1908–1993) played an important role in the development of the living will (as he had called his concept of an advance directive). But it is not clear when he developed his concept. We have screened the Luis Kutner Papers, deposited at the Hoover Institution Archives at Stanford University, California, to answer this question.

We found out that in the second half of 1967, Kutner dealt intensively with the issue of euthanasia. He planned a symposium, worked on an article on the “Due process of euthanasia”, and made contact with the Euthanasia Society of America. From that period dates the first mention of the term “living will” in the Luis Kutner Papers: in November 1967, Kutner had told members of the Euthanasia Society’s board of his “idea”.

On December 7, 1967, he delivered a speech at the annual meeting of the Euthanasia Society in New York and presented the concept of the living will to the audience.

Subsequently, the Euthanasia Society of America (resp. the Euthanasia Educational Fund resp. the Euthanasia Educational Council) adopted Kutner’s idea, as far as we know without any mention of his name. We do not know for sure, but it may well be that A. J. Rock Levinson, executive director of the Euthanasia Educational Council (1979) was correct in writing that after the meeting “five individuals including two Euthanasia Educational Council board members, composed documents expressing their wishes for treatment, and the withholding of treatment, during terminal illness. From these, a ‘Living Will’ was devised, which has been distributed by the Euthanasia Educational Council since 1969.”

We know for sure that at the latest in February 1969, the Euthanasia Educational Fund had devised a living will form, and had sent it round to members and to “other people” (among them: Luis Kutner!).

At that time, Kutner was still waiting for the ground-breaking article to be published which had emerged from his New York speech. “Due Process of Euthanasia: The Living Will, A Proposal” was printed in the *Indiana Law Journal*, but not before summer 1969.

While the living will concept slowly gained public ground in the first half of the 1970s, Kutner seems to have lost contact with the “movement”. But he had not lost sight of the living will. In 1974, he presented his living will concept before a euthanasia conference at Baylor University in Waco, Texas.

We could not specify when Kutner devised the first living will for a definite person. The material kept in Stanford led us to the conclusion that in the beginning of 1975 at the latest, Kutner had composed a living will standard form which he then disseminated.

After the Quinlan case had become public (in September 1975), Kutner often gave interviews or wrote articles on the topic of the living will. He told different stories regarding the birth of the living will idea.

Whether it was the process of dying suffered by Dr. George Thilo (who was assaulted in December 1928 and died most probably in 1929) which had first triggered Kutner’s concept of the living will, as the lawyer maintained more than once, could not be proved from the Luis Kutner Papers.

Correspondingly, Kutner’s repeated statement that he had “formalized” the living will around 1949/50, could not be evidenced and not even be associated with any plausible incident or occasion.

To sum up our results: Kutner surely was a pioneer of the living will concept, but further research is necessary to clarify, if he (or maybe Elsa W. Simon or Abraham L. Wolbarst, see above, footnote 7) was the “originator” of the living will concept in the sense of passive euthanasia.

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